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No. 350

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

KENNETH R. BROWN, Doing Business as
BROWN ENGINEERING COMPANY,
Petitioner,

v.

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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JAMES P. MITCHELL, Secretary of Labor,
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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on July 12, 1955.

CITATIONS TO OPINIONS BELOW.

The Memorandum Opinion with Findings of Fact and Conclusions of Law and Order Dismissing Complaint printed in Appendix B hereto, infra, p. 12, is reported in 126 F. Supp. 603. The opinion of the Circuit Court of Appeals printed in Appendix B hereto, infra, p. 22, has not yet been reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 12, 1955; and is printed in Appendix B hereto, infra, p. 35. The jurisdiction of this Court is invoked under Act of June 25, 1948, c. 646, 62 Stat. 928; 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

The Circuit Court of Appeals for the Eighth Circuit has construed the Fair Labor Standards Act of 1938, as amended, so as to hold that employees of a professional or consulting engineer whose activities are confined solely to such professional services (R. 6) and where the duties of his employees consist of the implementation of the professional engineer's services, then the said employees are "engaged in commerce." The Court did not consider the issue as to whether such employees were also engaged in the "production of goods for commerce." The questions presented are:

1. Whether employees of a professional or consulting engineer engaged in the private practice of his profession, and whose duties consist solely of implementing advices given to clients pursuant to that practice with respect to engineering and architectural problems are engaged "in commerce" within the meaning of the Fair Labor Standards Act.

2. Whether employees of a professional or consulting engineer engaged in the private practice of his profession, and whose duties consist solely of implementing advices given to clients pursuant to that practice with respect to engineering and architectural problems are engaged in the "production of goods for commerce" within the meaning of the Fair Labor Standards Act.

3. Whether an employee (designated in the profession as a "resident engineer") of a professional or consulting engineer, with respect to the services of such engineer during construction or alteration of instrumentalities engaged in commerce or in connection with the production of goods for commerce under a contract between an independent contractor or builder and the client of the engineer, is engaged in commerce or in the production of goods for commerce.

STATUTE INVOLVED.

The statutory provisions involved are Paragraphs (b), (i) and (j) of Section 3 of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, Section 3, 52 Stat. 1060 and Act of October 26, 1949, c. 736, Section 3, 63 Stat. 911, 29 U. S. C., Section 203). They are printed in Appendix A, infra, p. 11.

STATEMENT.

An action to enjoin petitioner from violating the provisions of Sections 15 (a) (1) and 15 (a) (2) of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, was filed in the United States District Court for the Southern District of Iowa, Central Division, on January 12, 1953 (R. 2). The jurisdiction of the District was invoked because a question arises under a law relating to commerce and the production of goods for commerce, Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949.

The basic facts, all of which were stipulated, are as follows:

Petitioner is engaged in the practice of a professional or consulting engineer. His work and that of his associ-

ates consists solely of consultation with clients with respect to engineering and architectural problems and the giving of advice and recommendations in the solution of such problems (R. 6). His employees, except for secretarial and bookkeeping employees, have knowledge of the application to the art and science of construction, of mathematics, of natural law, engineering and architectural principles (R. 6). The petitioner consults with clients with respect to proposed construction projects and after the client has determined to have the petitioner proceed with preliminary surveys, an engineering contract is entered into between the petitioner and his client (R. 7).

The contract between the petitioner-engineer and his client requiring the engineer to furnish and perform various professional services is essentially divided into two divisions (R. 7). The first division of the contract relates to the duties of the engineer previous to the beginning of actual construction. He proceeds to deliver initial surveys, plans, specifications, estimates of cost, preparation of form of notice to contractors, form of bidding proposal and contract between contractor and the owner (client) (R. 8). The client usually obtains bids from various contractors for the work to be done (R. 8) based on the plans and specifications prepared by the engineer, which at all times remain the property of the engineer (R. 7), and which, at the client's request, are sometimes sent to prospective bidders or suppliers in other states (R. 11). A deposit is required from prospective bidders to insure their return (R. 10-11). Where competitive bids are received the engineer usually is in attendance at the letting and examines and tabulates the bid to determine the lowest or most responsible bidder and to consult with the client with respect to the bidding proposals. The client decides to whom the contract shall be awarded (R. 8).

The second division of the contract between the petitioner-engineer and his client relates to the period after

the construction contract has been awarded by the client to the successful bidder. In some instances the client does not avail himself of the second division of the contract. At client's election the engineer undertakes the furnishing of inspection service during the construction period which varies on different projects, sometimes being relatively constant while at other times only weekly or periodic inspections are required (R. 8). The person assigned by the petitioner-engineer to perform this inspection service is oftentimes referred to as a "resident engineer." This term is a "word of art" in the profession and implies only that such resident engineer makes inspection reports and progress estimates at the actual site of construction. He inspects materials as delivered to the construction site to determine if they meet the specifications previously agreed to, and makes additional inspections for the sole purpose of ascertaining that the contractor is fulfilling his duties as set forth by the plans and specifications. He makes periodic estimates of the progress of the completion of the construction work and computes the percentage of moneys then earned under the construction contract and reports such computations to the owner-client with recommendation for payment thereof, if the work to that date has been performed in accordance with the plans, specifications and drawings (R. 9). Neither the petitioner nor his employee engaged in such inspection service have the right or duty to decide, direct or control the work of the contractor constructing such work, except to the extent only that he has the duty to make reports and recommendation to his clients regarding his findings with reference to whether or not such work conforms to the plans and specifications. The engineer does not buy or sell merchandise, supplies or equipment of any kind (R. 9). There is no implication that the resident engineer or inspector performs any supervisory authority or direction over the execution of the contract by the builder (R. 9-10).

The professional fees of the petitioner-engineer paid by his clients are usually based upon the percentage of estimated cost of the project. Two-thirds of the fee is usually due upon the completion of surveys, plans, specifications and cost estimates and the remaining one-third is payable from time to time as the construction progresses, in the event the client decides to retain the services of the engineer, during the construction period (R. 10). The services performed under the second division of the engineer's contract with his client are limited to the engineer and such of his employees as were designated resident inspector or resident engineer (R. 23).

Virtually all the professional services between the petitioner and his clients in the instant case related to projects within the State of Iowa, involving in general, preparation of plans and specifications for the paving of existing streets over which interstate commerce moved both before and after paving and for enlarging and making other additions to existing equipment of municipal or privately owned electrical power plants. One power plant owned by an interurban railroad supplied approximately twenty-five per cent (25%) of its electric output in the operation of the interurban railway system. A substantial portion of the freight hauled by the railroad was moved in interstate commerce (R. 11-20). Plans and specifications were also prepared in connection with new headquarters buildings of three existing rural electrification cooperatives which distribute electrical energy to railroads, factories, telephone networks, radio stations and highway patrols to enable them to carry on their various productive or interstate activities (R. 20-23). In each instance inspection service was supplied under division two of the petitioner's contracts with his respective clients (R. 23).

The construction contract between several of engineer's municipal clients and their respective contractors to which the engineer was not a party provided that the decision

of the engineer as to the meaning of specifications or plans and as to whether the work was in accordance therewith would be final (R. 24-25). During the years involved various employees of the engineer worked longer than forty (40) hours without being compensated for their work in excess of forty (40) hours per work week at rates not less than one and one-half times the regular rates at which they were employed (R. 23-24).

The District Court in its Memorandum Opinion filed November 10, 1954, Appendix B, infra, p. 12, held that the petitioner and his employees engaged in the performance of his professional duties as a consulting engineer for and on behalf of his respective clients in connection with the matters above related, concerning which there is no dispute, were neither engaged in commerce nor in the production of goods for commerce and accordingly dismissed the complaint with prejudice.

On appeal, the Court of Appeals reversed the lower Court, Appendix B, p. 22, holding that the cases of Laudadio v. White Construction Co. (C. A. 2), 163 F. 2d 383, and Ritch v. Puget Sound Bridge and Dredging Co. (C. A. 9), 156 F. 2d 334, and the "teachings of the Supreme Court" in Mitchell v. Vollmer, No. 387, October Term, 1954, decided June 6, 1955, were authority for finding that the employees for petitioner-engineer were "engaged in commerce" within the meaning of the Fair Labor Standards Act. It declined to rule on the issue as to whether they were also engaged in the "production of goods for commerce."

REASONS FOR GRANTING THE WRIT.

1. The decision of the Circuit Court of Appeals has decided an important and far reaching question of federal law which has not been settled by this Court. It has thereby held that the provisions of the Fair Labor Standards Act of 1938, as amended, extend to employees of pro-

fessional engineers or firms who perform professional and consultative services for their clients. The clients then in turn acting on such service or advice retain the services of independent contractors or builders to construct additions to or improvements of instrumentalities of commerce or of instrumentalities used in the production of goods for commerce. The decision of the Court of Appeals below in the instant case is in conflict with the decision of the Third Circuit Court of Appeals in Kelly v. Ford, Bacon and Davis, Inc., 162 F. 2d 555, and runs contrary to one of the basic holdings of the Second Circuit Court of Appeals in the case of Laudadio v. White Construction Co., 163 F. 2d 383. It also extends what it characterizes as the "teachings of the Supreme Court" in the case of Mitchell v. Vollmer, No. 387, October Term, 1954, decided June 6, 1955, beyond the area intended by the Supreme Court. It is contrary to the decision of Judge Chesnut in McComb v. Turpin (D. C. Md., 1948), 81 F. Supp. 86, which is the only case of record decided on facts almost completely identical to the instant case and which sets forth principles applicable to employees engaged in professional occupations.

2. The questions presented are of vital importance to all employers who perform professional services and to all of their employees. These questions should be settled by this Court. The employers who are vitally interested in the settlement of such questions are not limited solely to those who come within the strict classification of professional or consulting engineers, but include also architects, architectural firms, lawyers and law firms and indeed virtually all employers who are engaged in an occupation generally characterized as being within the professional class. The practical result of the decision of the lower Court is to blanket within the Fair Labor Standards Act an entirely new area of coverage of the Fair Labor Standards Act which was not intended by Congress to come within

the scope of the Act. See Statement of House Conferees, 1949 Amendments, Appendix C, infra, pp. 36, 37. It is to be noted that while the Committee Report refers to architectural firms, employees of an architectural firm performs services virtually identical with the services performed by employees of professional engineering firms (R. 6).

Neither did the Administrator of the Act originally contemplate that employees performing functions of this nature would come within the purview of the Act, Appendix C, infra, p. 37.

So far as is known to the petitioner, no Federal Court has extended the coverage of the Fair Labor Standards Act to include employees of an employer who solely performs professional services for his clients and whose employees are engaged primarily in the implementation of his professional services. So far as is known to the petitioner, none of the Courts have held that the independent acts of the client after receiving the professional advices of his consultant or consultant employees are of such a nature as to cause his consultant and his employees to be so closely related to commerce as to be a part of it.

The professional or consulting engineer and his employees are engaged in practicing a recognized profession (R. 6) as professional men and render professional services in the same manner as do lawyers, doctors and architects. In each instance, the client buys and pays for the knowledge and skill of his professional consultant. Having received such advice, either orally or by various types of written communications or reports, the client takes independent action, and during the progress of such action which follows as a result of his own decisions, he continues to exercise independent judgment. This is a principle well recognized by the Court. It establishes an effective and practical degree of remoteness between the pro-

fessions on the one hand and the activities of his client in commerce or in the production of goods for commerce on the other. The foregoing concept, which, until the decision of the lower Court, has not been violated, is based upon both technical and practical considerations. There should be no confusion between the cases involving employees of a contractor or builder who perform routine work in direct connection with the project in hand, Ritch v. Puget Sound Bridge and Dredging Co. (C. A. 9), 156 F. 2d 334, and the employees of the professional man or firm that renders solely professional or consultative service. The far reaching extent and the impact of the decision of the lower Court if permitted to stand can be well recognized.

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

EDGAR MUSGRAVE,
ALLEN WHITFIELD,
GERALD O. PATTERSON,
PETER W. JANSS,
Counsel for Petitioner.

August 19, 1955.

APPENDIX A.

STATUTE INVOLVED.

The pertinent statutory provisions of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, are:

Sec. 3. As used in this Act—

* * * * * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * * * * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

APPENDIX B.

Memorandum Opinion With Findings of Fact and Conclusions of Law and Order Dismissing Complaint.

(Filed in U. S. District Court on November 10, 1954.)

United States District Court, Southern District of Iowa, Central Division.

James P. Mitchell, Secretary of Labor U. S. Department of Labor, Plaintiff,

No. 2-318 vs. Civil Action

Kenneth R. Brown, doing business as Brown Engineering Company, Defendant.

This proceeding involves the coverage of the Fair Labor Standards Act of 1938, as amended. Plaintiff claims defendant to be within its coverage and asks a permanent injunction to enjoin and restrain defendant and others acting or claiming to act in his behalf and interest, from violating the provisions of the Act.

Defendant is engaged in the business of a professional consulting engineer, with offices in Des Moines, Iowa. He makes available to what are termed his clients, his professional services, which among other things include the development of drawings, working plans, specifications and estimates pertaining to the projects in which his clients are interested and concerning which they seek his professional advice and services. These plans and specifications and drawings remain defendant's property. Defendant does not engage in the construction or reconstruction, enlargement or extension of facilities alleged by plaintiff to be used in the production of goods in interstate commerce. In some instances, after the construction contract

is awarded, defendant or his employees supervise the construction to determine whether it is in harmony with the plans and specifications, and certify estimates as a further service.

The parties have entered into a written stipulation, with a supplemental stipulation, as to all the facts, which, while accepted as an agreed statement, is objected to by defendant as irrelevant and immaterial because of the denial as to coverage of the Act. The court desires parenthetically to commend counsel for having developed this stipulation and, too, because they were able, with no small expenditure of their time, so to stipulate their facts as to require at trial only the oral argument supplemented by their written briefs.

It may contribute to a better understanding of this opinion to quote paragraph I of the stipulation.

"I.

"The defendant, Kenneth R. Brown, doing business as Brown Engineering Company, is engaged in the practice of a professional or consulting engineer with offices in Des Moines, Iowa. His work and that of his associates consist solely of consultation with municipalities, associations, corporations, partnerships and individuals (hereinafter referred to as client or clients) with respect to engineering and architectural problems and the giving of advice and recommendations in the solution of such problems. All of his employees, except for secretarial and bookkeeping employees, have knowledge of the application to the art and science of construction, of mathematics, of natural law, engineering and architectural principles in which they have had special training and must be competent to perform creative work in the development of plans for structures to be erected or remodeled or for the installation of machinery therein as the case may be. The defendant is

a member of the American Society of Civil Engineers and of the Iowa Engineers Society."

The stipulation then discusses different projects for which defendant's services were utilized, a survey made, plans and specifications prepared, and describes the [the] manner in which the projects are operated or utilized as related to intrastate and interstate commerce. It was also stipulated that if the Act applies to defendant and his employees, the overtime provisions were violated.

Plaintiff contends that the employees of defendant, who performed some or all of the services and acts as described, are entitled to the benefits of the Act because they were engaged either in interstate commerce or in the production of goods for such commerce. Defendant categorically denies both contentions.

Counsel for both parties have furnished comprehensive briefs, quoting the authorities which they believe to control this situation. No attempt will be made to discuss and differentiate all the authorities cited by counsel. In 10 East 40th St. Co. v. Callus, 325 U. S. 578, 584, it was said:

"On the terms in which Congress drew the legislation we cannot escape the duty of drawing lines. And when lines have to be drawn they are bound to appear arbitrary when judged solely by bordering cases. To speak of drawing lines in adjudication is to express figuratively the task of keeping in mind the considerations relevant to a problem and the duty of coming down on the side of the considerations having controlling weight. Lines are not the worse for being narrow if they are drawn on rational considerations."

Plaintiff urges several propositions upon the court, among them being that employees who prepare plans and specifications which will be sent to places in other states

are engaged in the production of goods for interstate commerce; that employees who perform services in connection with contracts, plans and specifications which call for goods which must be fabricated to order by manufacturers in other states, are engaged in interstate commerce, and in the production of goods for interstate commerce. Plaintiff breaks the projects down into different categories which, it is claimed, because of the relation of these projects to interstate commerce, cause defendant's employees to be engaged in interstate commerce as to some projects, and in the production of goods for interstate commerce as to others.

Plaintiff places reliance on the opinion of the Ninth Circuit in Ritch et al. v. Puget Sound Bridge & Dredging Co., Inc., et al., 156 F. 2d 334, which was an action by employees to recover from their employers overtime payments under Sec. 207 of the Act. The defendants were private dredging contractors engaged in the dredging of two channels in the harbor of Bremerton Navy Yard and in the navigable waters of Puget Sound. Of the plaintiffs, five were draftsmen engaged in designing and laying out the work to be done by others, in the contracted dredging and dredging plant on the pier with its retaining walls. Three were timekeepers for all the workers on the project. The court said at page 337:

"In our opinion they were as much engaged in the construction of the channels inward from Puget Sound and the retaining walls and dredging installation on the pier to keep open the channels and berths as were the men dredging the channels and berths, the cement men working on the retaining walls and the mechanics installing the permanent dredging apparatus on the pier—all pursuant to the draftsmen's plans and the time kept by the timekeepers. Since such work is in commerce, the men so actually engaged in it are in commerce and entitled to time and a half pay for their admitted overtime work."

This court can have no quarrel with that determination. The lines there drawn "are drawn on rational considerations." On equally rational considerations is the decision in Western Union v. Lenroot, 323 U. S. 490, 65 S. Ct. 335, which holds that telegraph messages are goods. The Western Union case recognizes that long ago telegraph lines extending through different states were held to be instruments of commerce, and messages passing over them were held to be a part of the commerce. To discuss whether or not messages passing over interstate telegraph wires, or over no wires at all, between states, is a part of interstate communication, would appear as academic as to debate whether trains passing on their rails between states were in interstate transportation. But the fact that telegraph messages, which are an integral part of interstate communication, are held to be goods, does not have the effect of making defendant's plans and specifications goods within the meaning of the Act.

Plaintiff relies on Powell v. U. S. Cartridge Co., 339 U. S. 497, which holds that munitions produced were "goods" within the meaning of the Act, but it is not a sequitur that plans and specifications must be for that reason "goods". Here again we should focus "on the terms in which Congress drew the legislation." In the Powell case the writer of the opinion points out that the Fair Labor Standards Act of 1938 was said by its sponsor to be intended to carry out suggestions made by the President in his message to Congress. In the quotation from that message, at page 516 of 339 U. S., the President was quoted thus:

"to protect the fundamental interests of free labor and a free people we propose that only goods which have been produced under conditions which meet the minimum standards of free labor shall be admitted to interstate commerce. Goods produced under conditions which do

not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade."

The Act itself said, Sec. 2 (a):

"The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States, etc."

The beneficient purposes of the Act were stated "in bold and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality amply broad enough to include employees, of private contractors working on public projects as well as on private projects. Where exceptions were made, they were narrow and specific."

This court agrees with the writer of the opinion in the Callus case, supra, that "for drawing the figurative line the basis must be something practically relevant to the problem in hand."

The question was fully and ably discussed in McComb v. Turpin et al., 81 F. Supp. 86, by District Judge Chesnut of Maryland. It would unduly extend this opinion to quote the pertinent parts. Significantly, the defendants were engaged in the practice of professional or consulting engineers and architects, with offices in Baltimore, Maryland. Their work falls within the description of the work of the defendant as stipulated here. The only question that was raised was whether the employees were engaged in the production of goods for commerce. The

opinion states that it is not contended in that case that any of the defendant's employees are engaged in interstate commerce. This court adopts its reasoning as the basis of its own determination that the activities of the defendant and his employees do not cause them to be engaged in the production of goods for commerce.

Plaintiff insists, however, that whether engaged in the production of goods for commerce, the employees of defendant are in interstate commerce, and cites authority which he claims sustains that proposition. This court must find that, for the reasons stated in McLeod v. Threlkeld, 319 U. S. 491, the employees are not engaged in commerce. It is there said, page 497:

"The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

Counsel for both parties discuss Collins v. Ford, Bacon & Davis, Inc. (D. C. Penn.), 71 F. Supp. 229, and Kelly v. Ford, Bacon & Davis, Inc., 162 F. 2d 555. The Collins opinion supplements 66 F. Supp. 424, between the same parties. (Plaintiff here refers to defendant in each of the cited cases as "a construction contractor." Ford, Bacon & Davis, Inc., was in fact a construction engineering corporation engaged in all three cases in supervising the construction of a plant.) In 66 F. Supp. it was held that though the original construction of the factory building did not constitute interstate commerce and defendant was therefore not engaged in commerce in his employment at the plant site, the Act would apply if plaintiff was himself engaged in commerce and the other requisite conditions prescribed by law and the regulations were present. It was stated, page 426: "It is not suggested that plaintiff

is engaged in the production of goods." In 71 F. Supp. the court reopened the matter to permit plaintiff to file a supplementary affidavit addressed to that point. This affidavit related to plaintiff's activities "in the preparation of plans which contemplated or resulted in the purchase by the defendant, of materials, equipment or apparatus to be shipped to it from points outside of Pennsylvania."

The court held:

"the business of the employer being intrastate, the preparation of plans and the writing of letters, as a result of which persons other than the employer procure materials outside the state and ship them into Pennsylvania for use in performing their own independent contracts, constitute neither the production of goods for commerce nor engaging in commerce within the meaning of the Fair Labor Standards Act."

The court then went on to hold that plans, designs and letters were not goods where they are incidental to carrying on an intrastate business, "even though they may have something to do with ultimately moving goods in commerce." * * *

"Nor is the employee engaged in commerce under the test adopted by the Supreme Court in McLeod v. Threlkeld et al.," supra.

This court adopts that view.

In the Kelly case, supra, it was urged that irrespective of whether the defendant employer was engaged in commerce or in the production of goods therefor, plaintiff was so occupied because of the nature of his own position. Plaintiff here seeks to adopt that reasoning as to the employees of the defendant in the case at bar. The Third Circuit Court of Appeals said in the Kelly case at page 558 of Vol. 162 F. 2d:

"Plaintiff's individual activities are the test of whether he has the 'immediacy of participancy' in interstate commerce as to bring him within the 'in commerce' clause of the Act. * * *

"So while the plaintiff may have collaterally affected the movements of the materials and equipment we do not consider that it is within the contemplation of the Act to say that what he did bore the necessary close tie to commerce called for by the decisions."

This court recognizes that it has had to draw the lines referred to in the Callus case, above, and that plaintiff contends that these bordering cases and others leave no choice but to find the defendant and his employees within the coverage of the Act. The case at bar does not appear to this court to be a borderline case. The connection between what this defendant and his employees do in defendant's primary intrastate operation as a professional consulting engineer, with the activities of defendant's clients as collaterally affecting interstate commerce, is too tenuous to bridge the gap between the two for any practical or rational purposes. The effect of defendant's activities and those of his employees in commerce is too far removed from his main activities to have more than a remotely incidental effect. It is by no means so closely related as to be for all practical purposes an essential part of interstate commerce.

The court adopts as its findings of facts in this case the stipulation as supplemented and agreed upon by the parties and makes the same a part of this opinion by this reference. In lieu of separate conclusions of law to meet requirements of Rule 52 of the Rules of Civil Procedure, the court adopts those that are contained in this opinion.

The Clerk will enter the following order:

ORDER.

This cause was presented to the court without a jury on the 27th day of October, 1954, William C. Cull and Harper Barnes, both of Kansas City, Missouri, appearing for the plaintiff, and Edgar Musgrave, Gerald O. Patterson, and Peter W. Janss, all of Des Moines, Iowa, appearing for the defendant.

The cause was tried upon a written stipulation of facts and supplement thereto previously filed, was orally argued to the court, written briefs were filed and the cause was submitted.

The court finds that the plaintiff's application for an injunction to restrain defendant and those acting or claiming to act in his behalf and interest from violating the provisions of the Fair Labor Standards Act, should be denied and that plaintiff's complaint and application should be dismissed for the reasons stated in the opinion of the court filed this day.

It Is Therefore Ordered, Adjudged and Decreed that plaintiff's complaint and application should be, and the same is, hereby dismissed with prejudice. An exception is allowed.

Signed at Des Moines, Iowa, this 10th day of November, 1954.

Wm. F. Riley,
United States District Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS.

For the Eighth Circuit.

No. 15,258.

James P. Mitchell, Secretary of Labor, United States Department of Labor,
Appellant,

vs.

Kenneth R. Brown, doing business as Brown Engineering Company,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[July 12, 1955.]

Sylvia S. Ellison, Attorney, U. S. Department of Labor (Stuart Rothman, Solicitor; Bessie Margolin, Assistant Solicitor; Harry M. Leet, Attorney, U. S. Department of Labor, and B. Harper Barnes, Regional Attorney, were on the brief), for appellant.

Edgar Musgrave and Peter W. Janss (Allen Whitfield and Gerald O. Patterson were with them on the brief), for appellee.

Before Gardner, Chief Judge, and Woodrough and Vogel, Circuit Judges.

Woodrough, Circuit Judge.

The Secretary of Labor brought this action to enjoin defendant Kenneth R. Brown, doing business as Brown Engineering Company, from violating Sections 15 (a) (1) and 15 (a) (2) of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, 29 U. S. C. A., sections 201 et seq.[1] The District court had jurisdiction of the action by virtue of Section 17 of the Act, 29 U. S. C. A., Section 217. Plaintiff's complaint alleged that defendant had been and was continuing to violate the provisions of the Fair Labor Standards Act by "employing many of his employees in interstate commerce or in the production of goods for interstate commerce", for workweeks longer than forty hours without paying time-and-a-half overtime compensation for such work in excess of forty hours. The case was tried to the court sitting without a jury and all facts were stipulated before trial. The trial court adopted the stipulation as its

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[1] Sections 15 (a) (1) and 15 (a) (2) provide:

"(a) After the expiration of one hundred and twenty days from the date of enactment of sections 201-219 of this title, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, or section 207 of this title * * *.

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;"

Section 207 provides:

"(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

findings of fact and issued a memorandum opinion incorporating therein its conclusions of law. Judgment was entered dismissing the complaint and plaintiff appeals.

The stipulation of facts shows that defendant is a professional or consulting engineer employing approximately 43 persons at his place of business in Des Moines, Iowa. His work, and that of his associates, consists of consultations with clients respecting engineering and architectural problems and the giving of advice and recommendations for the solution thereof. After such consultations an engineering contract is entered into if the client determines to proceed with the proposed construction project. This contract consists essentially of two divisions or services to be performed by defendant.

The first part of the contract defines defendant's duties prior to the beginning of actual construction. Defendant agrees to make initial surveys and introductory investigations to produce the preliminary design of the construction contemplated; to thereafter prepare plans, specifications, drawings, designs and tabulations reflecting in detail the construction work to be performed; and to prepare estimate of cost, form of notice and bidding proposal, and form of contract between the client and the contractor. The client usually obtains bids on the proposed construction work but occasionaly defendant sends the plans and specifications directly to the prospective bidders. The plans and specifications at all times remain the property of the defendant and a deposit is required from prospective bidders to insure their return. Where competitive bids are taken defendant is usually in attendance at the letting, examines such bids, consults with his client and recommends the bids to be accepted. The client decides to whom the contract shall be awarded.

The second part of the engineering contract relates to defendant's duties after the construction work is awarded

to a contractor. Defendant agrees to furnish inspection service during the period of construction. The employee assigned by defendant to perform this inspection service is called a "resident engineer". His duties consist of inspecting all materials as they arrive at the job site to determine if they meet the specifications previously agreed to; inspecting the construction work to determine if the contractor is proceeding according to the plans and specifications; and making periodic estimates of the progress of construction, computing the percentage of moneys then earned by the contractor, and reporting such computations to the owner with recommendation for payment thereof if the work completed is in accordance with the plans and specifications. Inspection service varies on different construction projects, sometimes being relatively constant while at other times only weekly or periodic inspections are required. Defendant and his employees do not engage in the actual construction work on a project and do not have the right or duty to direct or control the work of the contractor, except to the extent of making reports and recommendations on the work performed.

Defendant's fee for services rendered under the engineering contract is in virtually all instances based upon a percentage of the estimated cost of the project as determined by the plans, specifications and estimate of cost. The fee for inspection service under the second part of the contract is usually equal to one-half of the amount charged for the preparation of plans and specifications under the first division of the contract.

The plans and specifications prepared by defendant and his employees are sometimes sent outside of Iowa to prospective bidders in other states, and occasionally the plans and specifications call for materials, parts, machinery, etc., which must be fabricated to order by factories and plants located outside of the state. Also, engineering contracts

entered into between defendant and Rural Electric Cooperatives required that defendant submit his plans and specifications to the Administrator of the Rural Electrification Administration at Washington, D. C., for approval.

During the period from 1950 to 1953 the stipulation showed that defendant and his employees participated, to the extent and according to the terms of the above described engineering contracts, in construction projects, all located within the State of Iowa, which may be considered in two groups: (1) Those involving instrumentalities of commerce, and (2) those involving the production of goods for commerce.

(1) Instrumentalities of commerce.

(a) Preparation of plans and specifications for the paving of approximately 37 sections of existing streets in four Iowa towns. Interstate commerce moved over all of these streets both before and after paving.

(b) Preparation of plans and specifications for enlarging the power plant and for making other additions to existing equipment of an interurban railroad. Approximately 25% of the power produced by the railroad is used in the operation of its railway. A substantial portion of the freight hauled by the railroad is moving in interstate commerce.

(2) Production of goods for commerce.

(a) Preparation of plans and specifications for the installation of additional equipment in the municipal power plant of the city of Pella, Iowa. The power plant supplies electricity to various enterprises which ship a substantial portion of their products outside of the state.

(b) Preparation of plans and specifications for new headquarters buildings for three rural electrification

cooperatives which dis ibute electrical energy to railroads hauling interstate freight and passengers; to factories producing goods for interstate commerce; to telephone networks and radio stations for interstate messages and programs; and to a state highway patrol for communications controlling interstate traffic.

The contracts for the paving of the streets and for the alteration and improvement of the Pella, Iowa, power plant all provided that the decision of the engineer as to the meaning of the plans and specifications, and as to whether the work was in accordance therewith, was final.

It was further stipulated that if defendant's employees come within the coverage of the Fair Labor Standards Act, the overtime provisions of said Act have been violated.

Upon the facts so stipulated the trial court was of the opinion that defendant's employees were neither engaged in commerce nor in the production of goods for commerce, as those terms are used and defined in the Fair Labor Standards Act. It concluded that: "The effect of defendant's activities and those of his employees in commerce is too far removed from his main activities to have more than a remotely incidental effect."

Since the enactment of the Fair Labor Standards Act in 1938 the courts have been constantly called upon to determine whether a particular employee or group of employees is engaged "in commerce" or in the "production of goods for commerce." The difficulty has been in finding an acceptable standard for ascertaining whether an employee's activities bring him within the coverage of the Act. The Supreme Court recognized this difficulty in **Kirschbaum Co. v. Walling**, 316 U. S. 517, 520, when it said: "To search for a dependable touchstone by which to determine whether employees are 'engaged in commerce or

in the production of goods for commerce' is as rewarding as an attempt to square the circle." In the final analysis, of course, each case must stand or fall on its own particular facts. In the course of reviewing decisions of lower courts in cases arising under the Act, the Supreme Court has announced several broad, guiding principles to be applied in determining coverage. These were reiterated in the very recent case of **Mitchell v. Vollmer**, No. 387, October Term, 1954, decided June 6, 1955, thus:

> "**We are dealing with a different Act of another vintage** [i. e., the Fair Labor Standards Act rather than the Federal Employees Liability Act]—**one that has been given a liberal construction from Kirschbaum Co. v. Walling**, 316 U. S. 517, to **Alstate Construction Co. v. Durkin**, 345 U. S. 13. **The question whether an employee is engaged 'in commerce' within the meaning of the present Act is determined by practical considerations, not by technical conceptions.** See **Walling v. Jacksonville Paper Co.**, 317 U. S. 546, 570; **Overstreet v. North Shore Corp.**, 318 U. S. 125, 128, 130. The test is whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity. See **McLeod v. Threlkeld**, 319 U. S. 491, 497. Repair of facilities of interstate commerce is activity 'in commerce' within the meaning of the Act, as we held in **Fitzgerald Co. v. Pedersen**, 324 U. S. 720. And we think the work of improving existing facilities of interstate commerce, involved in the present case, falls in the same category.[2]"

We consider first the correctness of the trial court's determination that defendant's employees were not engaged "in commerce." This involves consideration of the work performed by the employees on projects referred to

in (1) above, to-wit, the preparation of plans and specifications for the paving of streets carrying interstate traffic and for enlarging the power plant and making other additions to existing equipment of an interurban railroad, also carrying interstate traffic. Concededly, this work consisted of repairs, alterations, additions and improvements to existing facilities and did not constitute "new construction", as in, e. g., **Murphey v. Reed**, 335 U. S. 865. Nor can there be any doubt that the streets and interurban railroad in this case, both carrying persons and goods between states, were instrumentalities of interstate commerce. See **Overstreet v. North Shore Corp.**, 318 U. S. 125, at p. 129. The issue, therefore, reduces itself to whether the activities of defendant's employees in connection with these projects were so "directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated, local activity." **Mitchell v. Vollmer**, supra.

In concluding that the employees in this case were not engaged "in commerce", the trial court based its decision on **McLeod v. Threlkeld**, 319 U. S. 491; **Collins v. Ford, Bacon & Davis, Inc.**, D. C. Penn., 66 F. Supp. 424, and 71 F. Supp. 229; and **Kelly v. Ford, Bacon & Davis, Inc.**, 3 Cir., 162 F. 2d 555. The test laid down in **McLeod v. Threlkeld**, supra, for determining whether a person is engaged "in commerce" under the Fair Labor Standards Act was restated by the Supreme Court in **Mitchell v. Vollmer**, quoted in part above. In **Collins v. Ford, Bacon & Davis, Inc.**, D. C. Penn., 66 F. Supp. 424, defendant was supervising the construction of a plant for the Jacobs Aircraft Engine Company of Pottstown, Pennsylvania. Plaintiff, an employee of defendant, contended he was engaged "in commerce" because he prepared plans and drawings for defendant which were sent outside of the state and were used by contractors in submitting bids for construction work on the plant at Pottstown. The court granted summary judgment for de-

fendant, holding that defendant itself was not engaged in commerce because the work was original construction and that plaintiff's activity in preparing plans and drawings which were sent outside of the state was not sufficient to bring him within the "in commerce" phrase of the Fair Labor Standards Act. The case was reopened in 71 F. Supp. 229 to allow plaintiff to file a supplemental affidavit to bring himself within the "production of goods for commerce" phrase of the Act. The court held that the plans and drawings prepared by plaintiff were not "goods" within the meaning of the Act even though they may have something to do with ultimately moving goods in commerce. The Court also reiterated its views that plaintiff was not engaged "in commerce" and reaffirmed its order of summary judgment for the defendant. In **Kelly v. Ford, Bacon & Davis, Inc.**, 3 Cir., 162 F. 2d 555, plaintiff's duties were confined solely to processing extra work orders in connection with the construction of a new factory. The court held, inter alia, that, even though material and equipment came into the state as a result of these work orders, plaintiff's duties were not closely enough connected with interstate commerce to bring him within the coverage of the Fair Labor Standards Act. We think it significant that in both the **Collins** and **Kelly** cases, unlike the present one, plaintiff's activities were in connection with the construction of a new factory designed for the production of goods. In this case the activity of defendant's employees was in connection with the repair, alteration and improvement of existing instrumentalities of interstate commerce. Their duties, beyond the preparation of plans and specifications for a proposed construction project, required their presence at the job site as "resident engineer." Although the "resident engineer" did not remain at the project at all times, the stipulation shows it was his duty to inspect all incoming materials to determine if they measured up to specifications; to inspect work completed by the con-

tractor to ascertain if it conformed to the plans and specifications; and to make progress reports to the owner and recommend payment of moneys earned under the contract if the contractor's work was satisfactory. **The inference is fairly deducible that the work of the "resident engineer" was a vital factor affecting the progress of the construction project.** Further, although the stipulation recites that the "resident engineer" has no right or duty to direct or control the contractor in his work, **the fact remains that completion of a project depends in no small way upon the services rendered by defendant's employees. The street paving contracts between the various municipalities and contractors in this case provided:**

> "The Engineer shall decide any and all questions which may arise as to the quality and acceptability of materials furnished, work performed, and as to the manner of performance and rate of progress of said work. He shall decide all questions which may arise as to the interpretation **of the specifications, or plans relating to the work, and the fullfillment of the contract on the part of the contractor, and all questions as to the rights of different contractors on the project.** The Engineer shall determine the amount and quality of the several kinds of work performed and materials furnished which are to be paid for under the contract."

To hold that the "resident engineer" exercises no control over the work of the contractor and does not perform a vital function in the total activities of a construction project, **is to turn away from the realities and practical considerations of the situation and be guided by technical conceptions contrary to the teaching of the Supreme Court in Mitchell v. Vollmer,** supra.

That defendant's employees performed no actual manual labor on the projects under repair and improvement

appears not to be of controlling consideration. We find no requirement in the Fair Labor Standards Act that they do so. In **Laudadio v. White Construction Co.**, 2 Cir., 163 F. 2d 383, it was held that plaintiff's work, which consisted of making drawings and plans for the extension of existing instrumentalities of commerce and of preparing "bills of material", was "essential" to the repairs and alterations made by other employees of defendant and was "sufficiently closely related to the movement of commerce to justify a holding that the plaintiffs were 'engaged in commerce'." So here, defendant's employees' preparation of plans and specifications for the repair and improvement of existing instrumentalities of commerce, together with the activities of the "resident engineer" at the actual job site, were sufficient to bring them within the coverage of the "in commerce" phrase of the Fair Labor Standards Act.

The case of **Ritch v. Puget Sound Bridge and Dredging Co.**, 9 Cir., 156 F. 2d 334, appears to be directly in point and well-considered authority for holding that defendant's employees in this case are engaged "in commerce". In that case defendants were dredging contractors engaged in the dredging and improvement of two channels in the harbor of the Bremerton Navy Yard in the navigable waters of Puget Sound, used extensively for interstate commerce. The court observed and held:

> "The dredging contractors paid time and a half for overtime to all its employees engaged in constructing the channels, berths, retaining walls and pier, except the appellants [plaintiffs] and six others. The distinction seems to be made on the theory that they were so-called 'White Collar' workers. Five of them were draftsmen engaged in designing and laying out the work to be done by others in the contracted dredging and dredging plant on the pier with its retaining

walls. Three were timekeepers engaged in keeping the time of all who worked on the project. In our opinion they were as much engaged in the construction of the channels inward from Puget Sound and the retaining walls and dredging installation on the pier to keep open the channels and berths as were the men dredging the channels and berths, the cement men working on the retaining walls and the mechanics installing the permanent dredging apparatus on the pier —all pursuant to the draftmen's plans and the time kept by the timekeepers. Since such work is in commerce, the men so actually engaged in it are in commerce and entitled to time and a half pay for their admitted overtime work. They have the immediacy of participancy lacking in the cook of **McLeod v. Threlkeld**, 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538, cited in **Armour & Co. v. Wantock**, 323 U. S. 126, 131, 65 S. Ct. 165, 167, 89 L. Ed. 118."

The fact that plaintiff's immediate employer was performing the actual construction and repair work in the Ritch case, whereas defendant was not so employed in this case, is of minor significance. Questions of coverage under the Fair Labor Standards Act are determined on the basis of the employee's activity and not by the nature of the employer's business. **Overstreet v. North Shore Corp.**, supra.

Viewing the activities of defendant's employees in a practical aspect in relation to the whole construction project, and giving to the Fair Labor Standards Act the liberal interpretation required, we are convinced that the stipulated facts in this case demand a holding that the employees were engaged "in commerce" and that the trial court's conclusion to the contrary was erroneous. We have considered all of the contentions, cases, legislative history and administrative interpretations presented in appellee's

brief and oral argument but none appear to require a different result.

Holding, as we do, that defendant's employees were engaged "in commerce" within the meaning of the Fair Labor Standards Act, it is not necessary to consider plaintiff's further argument that they were also engaged in the "production of goods for commerce".

Reversed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

Judgment.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

September Term, 1954.

Tuesday July 12, 1955.

James P. Mitchell, Secretary of Labor, United States Department of Labor, Appellant,

vs.

Kenneth R. Brown, Doing Business as Brown Engineering Company.

No. 15,258.

Appeal from the United States District Court for the Southern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, It Is Now Here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this cause be, and the same is hereby, reversed.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court for proceedings consistent with the opinion of this Court this day filed herein.

July 12, 1955.

APPENDIX C.

Excerpts From Statement of House Conferees, Report No. 1453, 81st Congress, pp. 14-15, Reference 1949 Amendments to Fair Labor Standards Act.

"The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:

"1. A local fertilizer company engaged in selling all of its fertilizer to local farmers within the State for use on land on which sugar cane is grown, which cane is then sold to sugar mills within the State and processed into raw sugar which is sent out of the State (McComb, Administrator, v. Super-A Fertilizer Works, 165 F. (2d) 824 (C. C. A. 1)).

"2. Employees of a quarry engaged in mining and processing stone for local use in the construction of a dike located in the same State and who transport such rock from the quarry, to the construction site, where the construction of the dike would have the effect of preventing an oil field that produced oil for commerce from being flooded (Schroeder v. Clifton, 153 F. (2d) 385 (C. C. A. 10), cert. den., 328 U. S. 858).

"3. Employees of a local window-cleaning company doing business wholly within the State but many of whose customers are engaged in interstate commerce or in the production of goods for interstate commerce (Martino v. Michigan Window Cleaning Company, 327 U. S. 173, reh'g den., 327 U. S. 816).

"4. Employees of a local independent nursery concern whose duties include mowing the lawn around the plant

of a customer within the State engaged in producing goods for interstate commerce (1944-45 W. H. Man., p. 125).

"5. Employees of a local architectural firm whose activities include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce (1944-45 W. H. Man., p. 125).

"6. Employees of a local exterminator service firm, who work wholly within the State exterminating roaches and other pests in private houses, apartments, hotels, barber shops, colleges, hospitals, and also in buildings within the State used to produce goods for interstate commerce (3 C. C. H., Labor Law Reporter, 4th ed., No. 25, 150.385).

"All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating, or other living facilities for factory workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods."

Excerpt From Interpretative Bulletin, General Coverage of Wage and Hour Provisions of the Fair Labor Standards Act of 1938, as Amended, Part 776, Sub-Part A—General, May, 1950, p. 19.

"On the other hand, the legislative history makes it clear that employees of a 'local architectural firm' are not brought within the coverage of the Act by reason of the fact that their activities 'include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce.' Such activities are not 'directly essential' enough to the production of goods in the buildings to establish the required close relationship between their performance and such production when they are performed by employees of such a 'local firm.'"